

SEAN MICHAEL TAYLOR
Claimant

THE BOEING COMPANY
Respondent

KEMPER INSURANCE
Insurance Carrier

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ORDER

ISSUES

- (1) “Compensability.”
- (2) “Whether claimant is in need of current medical treatment.”

The respondent clarified in its brief before the Appeals Board that its broad issue of compensability was limited to whether claimant's accidental injury arose out of and in the course of his employment. This issue is a jurisdictional issue listed in K.S.A. 1996 Supp. 44-534a that grants the Appeals Board jurisdiction to review a preliminary hearing order.

(1) As claimant was leaving work through an exit gate into respondent's parking lot on September 19, 1996, at approximately 12:30 a.m., he was injured when he was assaulted by two unknown individuals. Claimant testified that two male assailants knocked him to the ground and kicked him as he was about five to ten feet out of the exit gate into the parking lot. Claimant testified that he did not know the assailants and did not know why he was assaulted. Claimant was not robbed as the assailants did not take any of his personal property.

Claimant lost consciousness from the assault and does not remember anything from the time of the assault until he was being loaded into the ambulance. Claimant was taken for examination and treatment to St. Joseph Medical Center's emergency department in Wichita, Kansas. He was released by the emergency department that morning with directions to see his personal physician, James P. Keller, M.D., for further examination and treatment.

On the date of the preliminary hearing, March 25, 1997, claimant continued under the treatment of Dr. Keller. Dr. Keller's medical records, admitted into evidence at the preliminary hearing, indicated that claimant was being treated for post-concussion syndrome and resulting seizures.

The Administrative Law Judge found that claimant's accidental injury arose out of and in the course of his employment with respondent. Respondent appeals and argues that the assault did not arise out of the employment with respondent. Respondent contends for the assault to be compensable there has to be some causal connection between the assault and claimant's employment. Respondent argues that, even though the assault occurred on respondent's property, in order for the assault to be compensable there has to be other evidence connecting the assault with the employment. In support of respondent's argument, respondent cites the Appeals Board's decision of Russell v Montgomery Ward, Docket No. 211,821 (January 1997), that held before injuries from idiopathic events are compensable, the employment must create some special hazard or risk.

Conversely, claimant argues that his injury did arise out of and in the course of his employment because there was a direct causal connection between the employment and the assault. Claimant contends that since respondent's plant and parking lot are both located in a high-crime area that the assault had a causal connection with his employment. Evidence was presented by both claimant and respondent that indicated, before the assault took place in that particular parking lot, there had been in 1996 a number of reports of theft and damage of property. Also, evidence was admitted that showed the adjacent parking lots of respondent also had a number of reports of theft and damage of property in 1996.

Before a worker is entitled to workers compensation benefits, he must prove that he suffered a personal injury by accident that arose out of and in the course of his employment. See K.S.A. 44-501(a). The two phrases "arising out of" and "in the course of" have two separate meanings and each condition must exist before compensation is allowable. Siebert v. Hoch, 199 Kan. 299, 428 P.2d 825 (1967). The fact that claimant's injury occurred during the course of his employment is not disputed by the parties.

In this case, the principal question is whether the assault that caused claimant's injury arose out of his employment relationship with respondent. The phrase "out of" employment requires some causal connection between the accidental injury and the employment. See Bohanan v. Schlozman Ford, Inc., 188 Kan. 795, 366 P.2d 28 (1961). The claimant cites two appellate court cases that the Appeals Board finds support the Administrative Law Judge's decision that claimant's injuries resulted from an assault that arose out of his employment with respondent. In the case of Hensley v. Carl Graham Glass, 226 Kan. 256, 597 P.2d 641 (1979), the Kansas Supreme Court affirmed the district court's decision that the death of a worker, who was killed by a sniper bullet while working on a nearby roof, was compensable. The district court had affirmed the Director of Workers Compensation's decision that found that the fact that the worker was on top of the parking garage adjacent to the sniper's location increased the risk of the worker being a target. This elevated position made the worker closer to the sniper and, therefore, the risk of being shot was substantially increased.

The Kansas Court of Appeals, in the case of Orr v. Holiday Inns, Inc., 6 Kan. App. 2d 335, 627 P.2d 1193 (1981), held that an employee who was injured as a result of an assault by an unknown assailant, that occurred while the employee was in the restroom on the employer's premises, also arose out of and in the course of her employer. The employee was a bartender who was employed by a motel in a high crime area. The court found that the employee was exposed to the attack by virtue of being in the high crime area at night for the purpose of employment. 6 Kan. App. 2d at 340.

The Appeals Board affirms the Administrative Law Judge's preliminary hearing Order and finds that claimant's injury was the result of an assault that had a causal connection with the employment. The Appeals Board concludes that claimant's risk of being assaulted at work was a greater risk than the general public was generally exposed because of the particular location of the respondent's plant and parking lot.

WHEREFORE, the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes, dated May 23, 1997, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of September 1997.

BOARD MEMBER

c: Robert R. Lee, Wichita, Ks
Frederick L. Haag, Wichita, Ks
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director